

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KAREN DALENE MARCHAND,

Plaintiff,

v.

NANCY A. BERRYHILL
(PREVIOUSLY COLVIN),
Acting Commissioner of Social
Security,¹

Defendant.

No. 2:16-cv-00156-RHW

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are the parties' cross-motions for summary judgment, ECF Nos. 13 & 14. Plaintiff Karen Dalene Marchand brings this action seeking judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner's final decision, which denied her application for Supplemental Security Income under Titles II and Title XVI of the Social Security Act, 42 U.S.C. § 1381-1383F. After reviewing the

¹ Nancy A. Berryhill became the Acting Commissioner of Social Security on January 20, 2017. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Nancy A. Berryhill is substituted for Carolyn W. Colvin as the defendant in this suit. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

1 administrative record and briefs filed by the parties, the Court is now fully
2 informed. For the reasons set forth below, the Court **GRANTS** Defendant's
3 Motion for Summary Judgment.

4 **I. Jurisdiction**

5 Ms. Marchand filed her applications for disability and disability insurance
6 benefits on December 15, 2011. AR 235-36. Her alleged onset date is March 1,
7 2010. AR 235. Her application was initially denied on March 27, 2012, AR 72-
8 101, and on reconsideration on June 12, 2012, AR 102-129.

9 Administrative Law Judge ("ALJ") Lori L. Freund held a hearing on
10 December 11, 2013. AR 32-71. On October 22, 2014, the ALJ issued a decision
11 finding Ms. Marchand ineligible for disability benefits. AR 11-25. The Appeals
12 Council denied Ms. Marchand's request for review on January 19, 2016, AR 1-3,
13 making the ALJ's ruling the "final decision" of the Commissioner.

14 Ms. Marchand timely filed the present action challenging the denial of
15 benefits on May 16, 2016. ECF No. 3. Accordingly, Ms. Marchand's claims are
16 properly before this Court pursuant to 42 U.S.C. § 405(g).

17 **II. Sequential Evaluation Process**

18 The Social Security Act defines disability as the "inability to engage in any
19 substantial gainful activity by reason of any medically determinable physical or
20 mental impairment which can be expected to result in death or which has lasted or

1 can be expected to last for a continuous period of not less than twelve months.” 42
2 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
3 under a disability only if the claimant’s impairments are of such severity that the
4 claimant is not only unable to do his previous work, but cannot, considering
5 claimant's age, education, and work experience, engage in any other substantial
6 gainful work that exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A) &
7 1382c(a)(3)(B).

8 The Commissioner has established a five-step sequential evaluation process
9 for determining whether a claimant is disabled within the meaning of the Social
10 Security Act. 20 C.F.R. §§ 404.1520(a)(4) & 416.920(a)(4); *Lounsbury v.*
11 *Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006).

12 Step one inquires whether the claimant is presently engaged in “substantial
13 gainful activity.” 20 C.F.R. §§ 404.1520(b) & 416.920(b). Substantial gainful
14 activity is defined as significant physical or mental activities done or usually done
15 for profit. 20 C.F.R. §§ 404.1572 & 416.972. If the claimant is engaged in
16 substantial activity, he or she is not entitled to disability benefits. 20 C.F.R. §§
17 404.1571 & 416.920(b). If not, the ALJ proceeds to step two.

18 Step two asks whether the claimant has a severe impairment, or combination
19 of impairments, that significantly limits the claimant’s physical or mental ability to
20 do basic work activities. 20 C.F.R. §§ 404.1520(c) & 416.920(c). A severe

1 impairment is one that has lasted or is expected to last for at least twelve months,
2 and must be proven by objective medical evidence. 20 C.F.R. §§ 404.1508-09 &
3 416.908-09. If the claimant does not have a severe impairment, or combination of
4 impairments, the disability claim is denied, and no further evaluative steps are
5 required. Otherwise, the evaluation proceeds to the third step.

6 Step three involves a determination of whether any of the claimant's severe
7 impairments "meets or equals" one of the listed impairments acknowledged by the
8 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
9 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526 & 416.920(d), 416.925, 416.926;
10 20 C.F.R. § 404 Subpt. P. App. 1 ("the Listings"). If the impairment meets or
11 equals one of the listed impairments, the claimant is *per se* disabled and qualifies
12 for benefits. *Id.* If the claimant is not *per se* disabled, the evaluation proceeds to
13 the fourth step.

14 Step four examines whether the claimant's residual functional capacity
15 enables the claimant to perform past relevant work. 20 C.F.R. §§ 404.1520(e)-(f)
16 & 416.920(e)-(f). If the claimant can still perform past relevant work, the claimant
17 is not entitled to disability benefits and the inquiry ends. *Id.*

18 Step five shifts the burden to the Commissioner to prove that the claimant is
19 able to perform other work in the national economy, taking into account the
20 claimant's age, education, and work experience. *See* 20 C.F.R. §§ 404.1512(f),

1 404.1520(g), 404.1560(c) & 416.912(f), 416.920(g), 416.960(c). To meet this
2 burden, the Commissioner must establish that (1) the claimant is capable of
3 performing other work; and (2) such work exists in “significant numbers in the
4 national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*,
5 676 F.3d 1203, 1206 (9th Cir. 2012).

6 **III. Standard of Review**

7 A district court's review of a final decision of the Commissioner is governed
8 by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited, and the
9 Commissioner's decision will be disturbed “only if it is not supported by
10 substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1144,
11 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means “more than
12 a mere scintilla but less than a preponderance; it is such relevant evidence as a
13 reasonable mind might accept as adequate to support a conclusion.” *Sandgathe v.*
14 *Chater*, 108 F.3d 978, 980 (9th Cir.1997) (quoting *Andrews v. Shalala*, 53 F.3d
15 1035, 1039 (9th Cir. 1995)) (internal quotation marks omitted). In determining
16 whether the Commissioner’s findings are supported by substantial evidence, “a
17 reviewing court must consider the entire record as a whole and may not affirm
18 simply by isolating a specific quantum of supporting evidence.” *Robbins v. Soc.*
19 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock v. Bowen*, 879
20 F.2d 498, 501 (9th Cir. 1989)).

1 In reviewing a denial of benefits, a district court may not substitute its
2 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
3 1992). If the evidence in the record “is susceptible to more than one rational
4 interpretation, [the court] must uphold the ALJ's findings if they are supported by
5 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104,
6 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
7 2002) (if the “evidence is susceptible to more than one rational interpretation, one
8 of which supports the ALJ’s decision, the conclusion must be upheld”). Moreover,
9 a district court “may not reverse an ALJ's decision on account of an error that is
10 harmless.” *Molina*, 674 F.3d at 1111. An error is harmless “where it is
11 inconsequential to the [ALJ's] ultimate nondisability determination.” *Id.* at 1115.
12 The burden of showing that an error is harmful generally falls upon the party
13 appealing the ALJ's decision. *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

14 **IV. Statement of Facts**

15 Karen Marchand was born in 1962 and has at least a high school education.
16 AR 23. She has previous work experience as a receptionist, construction worker,
17 teacher aide, farm worker, cashier, and janitor. *Id.*

18 Ms. Marchand alleges numerous physical and mental impairments, including
19 obesity, depression, hypothyroidism, pain disorder, and schizoid personality
20

1 disorder. ECF No. 13 at 3. She states that her mental impairments began shortly
2 after an incident in April 2009 involving police officers. *Id.*

3 **V. The ALJ's Findings**

4 The ALJ determined that Ms. Marchand was not under a disability within
5 the meaning of the Act from March 1, 2010, through the date of the decision. AR
6 25.

7 **At step one**, the ALJ found that Ms. Marchand had not engaged in
8 substantial gainful activity since March 1, 2010, her alleged onset date (citing 20
9 C.F.R. §§ 404.1571 *et seq.* and 416.971 *et seq.*). AR 13.

10 **At step two**, the ALJ found Ms. Marchand had the following severe
11 impairments: obesity, bilateral leg edema, hypothyroidism, major depressive
12 disorder, pain disorder with psychological factors and a general medical condition,
13 and schizoid personality disorder (citing 20 C.F.R. §§ 404.1520(c) and
14 416.920(c)). AR 13-15.

15 **At step three**, the ALJ found that Ms. Marchand did not have an impairment
16 or combination of impairments that meets or medically equals the severity of one
17 of the listed impairments in 20 C.F.R. §§ 404, Subpt. P, App. 1. AR 15-18.

18 **At step four**, the ALJ found Ms. Marchand had the following residual
19 functional capacity: She can perform light work, except “she could frequently
20 stoop, kneel, crouch, and climb ramps or stairs, occasionally crawl, and never

1 climb ladders, ropes, or scaffolds; she should avoid concentrated exposure to
2 extreme cold, excessive vibration, and hazards such as moving machinery and
3 unprotected heights; she would be limited to simple, routine, and repetitive tasks;
4 she would work best away from the public; she could have superficial contact with
5 co-workers and supervisors but could not perform tandem tasks; she could tolerate
6 no more than occasional changes in the work setting or tasks; and she could not be
7 required to perform production-rate or quota-based work.” AR 18-23.

8 The ALJ determined that Ms. Marchand could not perform her past relevant
9 work as a receptionist, construction worker, teacher aide, farm worker, cashier, and
10 janitor. AR 23.

11 At **step five**, the ALJ found that in light of her age, education, work
12 experience, and residual functional capacity, there are jobs that exist in significant
13 numbers in the national economy that Ms. Marchand can perform. AR 24-25.
14 These include Housekeeping, Cleaner; Sorter, Agricultural Produce; Cafeteria
15 Attendant; Cannery Worker; and Marker, Price. *Id.* The ALJ consulted a
16 vocational expert in making this determination. *Id.*

17 VI. Issues for Review

18 Ms. Marchand argues that the Commissioner’s decision is not free of legal
19 error and not supported by substantial evidence. Specifically, she argues the ALJ
20 erred by: (1) improperly rejecting the opinions of Ms. Marchand’s examining

1 providers Drs. Catherine MacLennan, Ph.D., and Stephen Rubin, Ph.D.; (2)
2 improperly rejecting Ms. Marchand's subjective complaints; and (3) failing to
3 conduct an adequate step five analysis. ECF No. 13 at 7.

4 **VII. Discussion**

5 **A. The ALJ properly evaluated the medical evidence, including the** 6 **opinions of Drs. MacLennan and Rubin.**

7 **1. Legal Standard.**

8 The Ninth Circuit has distinguished between three classes of medical
9 providers in defining the weight to be given to their opinions: (1) treating
10 providers, those who actually treat the claimant; (2) examining providers, those
11 who examine but do not treat the claimant; and (3) non-examining providers, those
12 who neither treat nor examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th
13 Cir. 1996) (as amended).

14 A treating provider's opinion is given the most weight, followed by an
15 examining provider, and finally a non-examining provider. *Id.* at 830-31. In the
16 absence of a contrary opinion, a treating or examining provider's opinion may not
17 be rejected unless "clear and convincing" reasons are provided. *Id.* at 830. If a
18 treating or examining provider's opinion is contradicted, it may only be discounted
19 for "specific and legitimate reasons that are supported by substantial evidence in
20 the record." *Id.* at 830-31.

1 The ALJ may meet the specific and legitimate standard by “setting out a
2 detailed and thorough summary of the facts and conflicting clinical evidence,
3 stating his interpretation thereof, and making findings.” *Magallanes v. Bowen*, 881
4 F.2d 747, 751 (9th Cir. 1989) (internal citation omitted). When rejecting a treating
5 provider’s opinion on a psychological impairment, the ALJ must offer more than
6 his or her own conclusions and explain why he or she, as opposed to the provider,
7 is correct. *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

8 **2. Dr. MacLennan.**

9 Dr. MacLennan evaluated Ms. Marchand in May 2013. AR 564-596. At the
10 evaluation, Dr. MacLennan performed multiple psychological tests. AR 570-73.
11 Cognitive testing demonstrated that Ms. Marchand’s cognitive abilities were in the
12 borderline to low average range, her memory skills were in the low average to
13 average range, and her intelligence was within the expected range with a weakness
14 in basic math abilities. AR 570-71. Personality testing was less reliable, however,
15 as Dr. MacLennan noted responses outside of the normal range, “suggesting that
16 she may not have answered in a completely forthright manner.” AR 571. Dr.
17 MacLennan also noted significant issues with hostility. AR 572.

18 Dr. MacLennan described alternating periods of anger, tears, and laughter
19 throughout their visit. AR 567. Dr. MacLennan also noted “hyperv verbal” speech
20 that was “fast paced, high pitched, and difficult to understand” that alternated with

1 normal volume, pace, and fluency. AR 568. Dr. MacLennan found Ms.
2 Marchand's thinking to be nonlinear. *Id.* Dr. MacLennan opined there were likely
3 multiple diagnoses, including major depressive disorder, pain disorder with
4 medical factors and psychological factors, and schizoid personality disorder. AR
5 574-75.

6 Dr. MacLennan also discussed "indications of malingering or factitious
7 behavior other than some possible overreporting of symptoms and problems on the
8 PAI." AR 575. She did not further discuss this finding, but it strongly influenced
9 the ALJ. ALJ Freund gave significant weight generally to the objective findings of
10 Dr. MacLennan, but she did not credit the conclusions reached because they were
11 based possibly on malingering behavior. AR 22.

12 An ALJ may properly discredit a doctor's opinion if it is contradicted by
13 objective evidence or other findings. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1216
14 (finding that it is a clear and convincing reason to reject a doctor's opinion when it
15 was contradicted by doctor's own observations and opinions). Dr. MacLennan
16 does not account for how her own recorded observations of malingering and
17 overreporting in her findings. The Court finds no error in ALJ Freund's decision to
18 accept only Dr. MacLennan's objective findings and not those that are internally
19 inconsistent or otherwise unreliable.

20 //

1 **3. Dr. Rubin.**

2 After Ms. Marchand's hearing, ALJ Freund provided interrogatories to Dr.
3 Rubin, who reviewed the full record through Exhibit 20F and provided a medical
4 opinion based on this review. AR 22, 916-28. Dr. Rubin opined that Ms. Marchand
5 would have mild difficulties understanding and remembering complex instructions,
6 mild difficulties carrying out complex instructions, moderate difficulties making
7 judgments on complex work-related decisions, moderate difficulties in maintaining
8 social function, and mild difficulties in maintaining concentration, persistence, or
9 pace. AR 921, 925. ALJ Freund assigned significant weight to Dr. Rubin's opinion
10 because she found it to be consistent with the record, which he had the ability to
11 review nearly in its entirety. AR 22.

12 Ms. Marchand alleges that the ALJ erred by "ignor[ing] important
13 limitations imposed by Dr. Rubin." ECF No. 13 at 12. Specifically, Ms. Marchand
14 points to difficulties with supervisors and a general history of failing at some tasks.
15 *Id.*

16 To the contrary, the ALJ provided numerous restrictions within the residual
17 functional capacity that reflects the mental limitations set forth by Dr. Rubin. Ms.
18 Marchand was limited to simple, routine, and repetitive tasks, which
19 accommodates for Dr. Rubin's proposed limitations regarding complex tasks and
20 Ms. Marchand's difficulties with concentration, persistence, and pace. *See Stubbs-*

1 *Danielson v. Astrue*, 539 F.3d 1169, 1175 (9th Cir. 2008) (finding that limitations
2 to simple tasks could account for even moderate limitations in concentration,
3 persistence, and pace). She was further prohibited from production-rate or quota-
4 based work, which would avoid issues with complex tasks and pace. With regard
5 to her struggles with supervisors, the ALJ limited Ms. Marchand to only superficial
6 contact with co-workers and supervisors and a bar on tandem tasks. AR 19. These
7 limitations within the residual functional capacity sufficiently account for the
8 limitations proposed by Dr. Rubin and align with his opinion. The Court finds no
9 error.

10 **B. The ALJ properly evaluated Ms. Marchand’s credibility.**

11 An ALJ engages in a two-step analysis to determine whether a claimant’s
12 testimony regarding subjective symptoms is credible. *Tommasetti*, 533 F.3d at
13 1039. First, the claimant must produce objective medical evidence of an underlying
14 impairment or impairments that could reasonably be expected to produce some
15 degree of the symptoms alleged. *Id.* Second, if the claimant meets this threshold,
16 and there is no affirmative evidence suggesting malingering, “the ALJ can reject
17 the claimant’s testimony about the severity of [his] symptoms only by offering
18 specific, clear, and convincing reasons for doing so.” *Id.*

19 In this case, there is affirmative evidence suggesting malingering. Dr.
20 MacLennan described overreporting and factitious behavior by Ms. Marchand in

1 her report. AR 575. Dr. Rubin also noted a great deal of “controversy” in Ms.
2 Marchand’s record and that “[a]t times, [Ms. Marchand] seems to exaggerate her
3 symptomatology and has been quite diligent in seeking out professionals to work
4 with or help her.” AR 919. This affirmative evidence alone is sufficient to support
5 a negative credibility determination. *See Smolen v. Chater*, 80 F.3d 1273, 1283-84
6 (9th Cir. 1996) (finding of either affirmative evidence of malingering or clear and
7 convincing reasons may support a rejection of a claimant’s testimony).

8 Moreover, the ALJ also provided clear and convincing reasons for
9 discrediting Ms. Marchand’s testimony in addition to the evidence of malingering.
10 In weighing a claimant's credibility, the ALJ may consider many factors, including,
11 “(1) ordinary techniques of credibility evaluation, such as the claimant's reputation
12 for lying, prior inconsistent statements concerning the symptoms, and other
13 testimony by the claimant that appears less than candid; (2) unexplained or
14 inadequately explained failure to seek treatment or to follow a prescribed course of
15 treatment; and (3) the claimant's daily activities.” *Smolen*, 80 F.3d at 1284. ALJ
16 Freund pointed to numerous activities that did not support the level of impairment
17 claimed, including social interactions, job interviews, shopping, bicycle rides, the
18 ability to maintain a 3.0 grade point average in her last semester and, most
19 significantly, Ms. Marchand’s completion of an associate’s degree. AR 21-22.
20 Further, the ALJ noted that the repeated efforts by Ms. Marchand to get a job,

1 including applications and interviews, indicated that she believed herself capable
2 of working, which is inconsistent with her asserted limitations. AR 21.

3 Because the ALJ provided both affirmative evidence of malingering and
4 clear and convincing reasons regarding Ms. Marchand's credibility, the Court finds
5 no error in the weight given to Ms. Marchand's subjective complaints.

6 **C. The ALJ did not fail to meet her step five burden.**

7 Ms. Marchand attempts to reargue the same issues in her challenge to the
8 ALJ's step five analysis. She asserts that the hypothetical posed to the vocational
9 expert was incomplete because it failed to account for the limitations posed by Drs.
10 MacLennan and Rubin and for the testimony by Ms. Marchand regarding her
11 absenteeism. ECF No. 13 at 14-15. These issues have already been addressed and
12 the Court has found no error. *See supra* at 9-15.

13 **VIII. Conclusion**

14 Having reviewed the record and the ALJ's findings, the Court finds the
15 ALJ's decision is supported by substantial evidence and free of legal error.

16 Accordingly, **IT IS ORDERED:**

- 17 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **DENIED**.
18 2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is
19 **GRANTED**.

1 3. The District Court Executive is directed to enter judgment in favor of
2 Defendant.

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
4 Order, forward copies to counsel and **close the file.**

5 **DATED** this 13th day of February, 2017.

6 s/Robert H. Whaley
7 ROBERT H. WHALEY
8 Senior United States District Judge
9
10
11
12
13
14
15
16
17
18
19
20